

CRIMINAL YEAR SEMINAR

April 19, 2019 - Tucson, Arizona
April 26, 2019 - Phoenix, Arizona
May 3, 2019 - Chandler, Arizona



US SUPREME COURT LAW UPDATE

Presented By:

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Attorney at Law

Distributed By:

**ARIZONA PROSECUTING ATTORNEYS' ADVISORY
COUNCIL**

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And

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5130 N. Central Ave
Phoenix, AZ 85012

OCTOBER TERM 2018 (2018 and early 2019 cases) SUPREME COURT OF THE UNITED STATES

MI LAW OFFICES OF
Robert J.
McWhirter

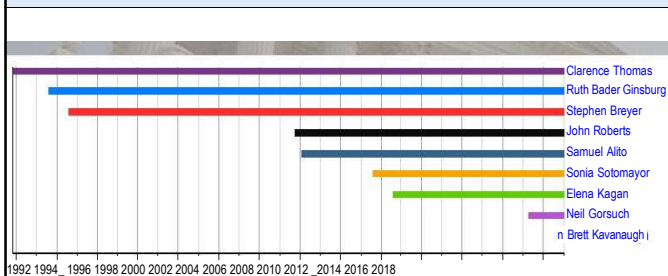
1

About the Court?




2

Supreme Court Tenure (but not Seniority)



3



**Donald Trump's
Potential Supreme Court Picks**

Why Kavanaugh?
Brett Kavanaugh Supported Broad Leeway For Presidents Under Investigation



Kavanaugh - 2009 article: "we should not burden a sitting president with civil suits, criminal investigations, or criminal prosecution" and "if the president does something dastardly, the impeachment process is available."

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**Still Appears to be
The Roberts Court
*Not the Dreaded
Pirate Roberts Court***

The chief justice prefers to maintain stability and predictability where possible.

Kavanaugh (so far) appears in line with the Chief.

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The Point Spread

The Center Justices
Roberts, Kagan, Kennedy and Breyer

The Left
Ginsburg + Sotomayor

The Right
Thomas + Alito + Gorsuch

The Judicial Activists



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Pending Key Non-Criminal Cases

Deferred Action for Childhood Arrivals -
The Trump administration phase out the Obama-era DACA.

Federal district courts in California and New York enjoined the administration.



Transgender military ban - three district courts blocked the administration's transgender ban.

Administration bypassed normal judicial order in asking for Supreme Court review. Administration claims transgenders threaten "readiness, good order and discipline, sound leadership, and unit cohesion."

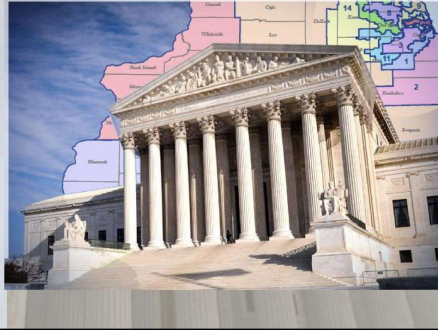


7

Pending Key Non-Criminal Cases

Partisan Gerrymandering -
Constitutionality of extreme redistricting.

Maryland Democrats and North Carolina Republicans brought case. *Lamone v. Benisek*, No. 18-726 and *Rucho v. Common Cause*, No. 18-422 (Argued March 26, 2019).



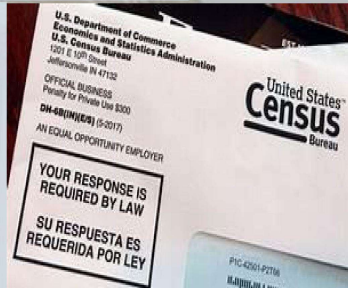
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Pending Key Non-Criminal Cases

2020 Census - The citizenship question.

Federal agency powers - *Kisor v. Wilkie*, No. 18-15 Argued March 27, 2019.

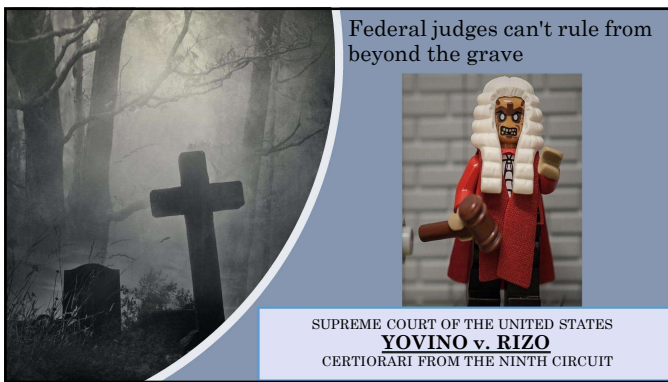
Issue(s): Whether the Supreme Court should overrule *Auer* and *Bowles* directing courts defer to an agency's reasonable interpretation of its own ambiguous regulation.



9



10




11

SUPREME COURT OF THE UNITED STATES YOVINO v. RIZO CERTIORARI FROM THE NINTH CIRCUIT	
<ul style="list-style-type: none"> · Ninth Circuit Judge Stephen Reinhardt died March 29, 2018 · Authored a decision 11 days after his death. 	
<ul style="list-style-type: none"> · Equal Pay Act case – 11 member <i>en banc</i> panel · Fresno County public school math consultant Aileen Rizo sued because she made less than male colleagues · Why did this case go to Supremes? · 6 to 5 spit 	
<div style="text-align: right;">R.I.P.</div>	

12

Case of the walking dead judge "it is generally



When a justice dies his votes don't count – e.g. Justice Antonin Scalia

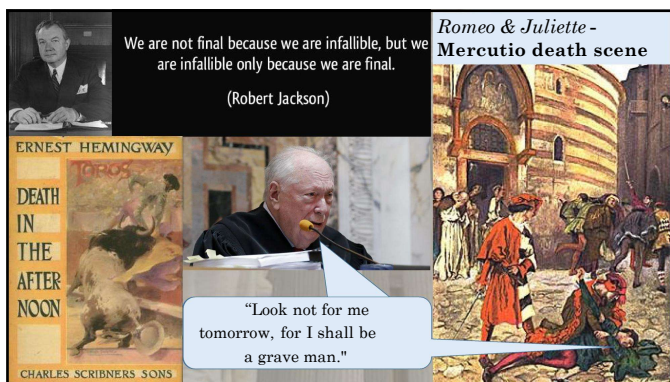
understood that a judge may change his or her position up to the very moment when a decision is released."

"federal judges are appointed for life, not for eternity."

13

We are not final because we are infallible, but we are infallible only because we are final.
(Robert Jackson)

Romeo & Juliette - Mercutio death scene



ERNEST HEMINGWAY
DEATH IN THE AFTER NOON
CHARLES SCRIBNER'S SONS

"Look not for me tomorrow, for I shall be a grave man."

14

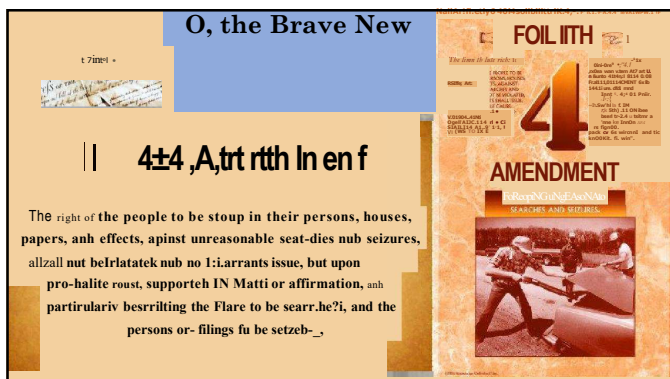
O, the Brave New

FOIL WITH

4

AMENDMENT

THE RIGHT OF THE PEOPLE TO BE STOUT IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEIZURES, NUB SEIZURES, ALLZALL NUT BEIRLATEK NUB NO I:ARRANTS ISSUE, BUT UPON PRO-HALITE ROUST, SUPPORTEH IN MATTI OR AFFIRMATION, ANH PARTIULARIV BESRILTING THE FLARE TO BE SEARR.HE?I, AND THE PERSONS OR- FILINGS FU BE SETZEB-.



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COMING
ATTRactions

SUPREME COURT OF THE
UNITED STATES

KANSAS v. GLOVER

No. 18–556

COMING
ATTRactions

Issue: During an investigatory stop, can an officer reasonably suspect the vehicle's registered owner is driving absent contrary information.

- Sheriff's deputy checked pick-up registration.
- Registered to Glover – who had revoked driver's license.
- Deputy pulled truck over.
- Glover charged with driving without a li



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KANSAS v. GLOVER, No. 18–556

Glover argue deputy lacked reasonable suspicion to stop.

Kansas argues reasonable suspicion because deputy knew car's owner lacked valid driver's license and could infer owner was driver.



- Trial judge ruled against Glover
- Kansas Supreme Court rule for Glover.
- Kansas petitioned to U.S. Supreme Court.




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Reminder from last year.


BYRD v. UNITED STATES, 584 U.S. (2018)

Held: Driver in lawful possession of a rental car though not listed on the rental agreement still has a reasonable expectation of privacy.



Prediction:

If we assume the rental case driver has a 4th Amendment expectation of privacy, then an officer can reasonably assume the driver is an owner?



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**COMING
ATTRactions**

SUPREME COURT OF THE UNITED STATES

MITCHELL v. WISCONSIN,
No. 18-6210 – Argument set
for March 23, 2019.

**COMING
ATTRactions**

Issue: Is an implied consent statute that allows officers to draw blood from unconscious drivers without a warrant constitutional?

- **Facts:** Gerald Mitchell arrested for DUI.
- Breath test = blood-alcohol of 0.24
- Mitchell passed out at hospital and that blood test revealed 0.222.



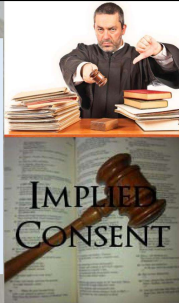
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**COMING
ATTRactions**

MITCHELL v. WISCONSIN, No. 18-6210

**COMING
ATTRactions**

- Mitchell argued the blood-test results were inadmissible for lack of warrant.
- Wisconsin Supreme Court upheld the blood test, because Wisconsin law authorized the blood test.
- Implied consent to the test by getting behind the wheel.



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**COMING
ATTRactions**

Reminder from 2017 Talk
SUPREME COURT OF THE UNITED STATES
BIRCHFIELD v. NORTH DAKOTA
136 S. Ct. 2160 (2016).

**COMING
ATTRactions**

Blood Draws and Implied Consent Laws

Issue: Implied consent laws for breath and blood tests criminalizing refusal to submit.



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Reminder from 2017 Talk
BIRCHFIELD v. NORTH DAKOTA, 136 S. Ct. 2160 (2016).

Held: The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests.



Birchfield held nothing about whether an implied-consent law can apply to an *unconscious* motorist, who, by definition, cannot withdraw consent.

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MITCHELL v. WISCONSIN, No. 18-6210

- Wisconsin argues Court approved of implied-consent laws in *South Dakota v. Neville*, 459 U.S. 553 (1983)
- Birchfield* only means no “criminal penalties on the refusal to submit to such a test.”
- Birchfield* stated “nothing we say here should be read to cast doubt on” implied consent.
- Michell argues the Court ruled in *Missouri v. McNeely*, 569 U.S. 141 (2013) a nonconsensual warrantless blood draw in a routine DWI investigation violated the 4th Amendment.
- No factors other than the natural dissipation of blood-alcohol suggest an emergency.
- Birchfield* directly applies.

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MITCHELL v. WISCONSIN, No. 18-6210

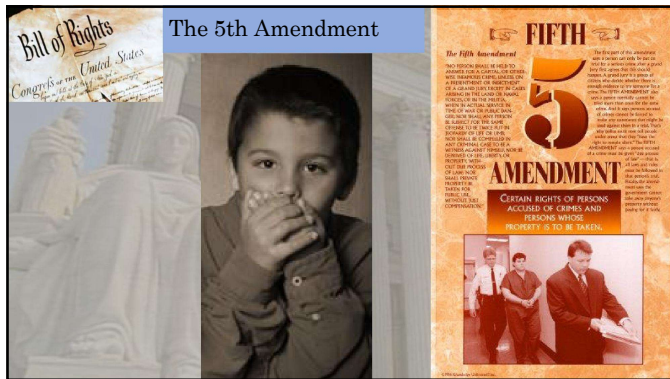
Prediction:
Michell wins – *Birchfield* applies.



Alito wrote *Birchfield* with Roberts, Kennedy, Breyer and Kagan. Sotomayor and Ginsburg concurred.

Only Thomas dissented

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Reminder from 2017 Talk

Bravo-Fernandez v. United State,
No. 15-537

Held: The Double Jeopardy Clause does not bar government from retrying defendants after a "jury has returned irreconcilably inconsistent verdicts of conviction and acquittal and the convictions are later vacated for legal error unrelated to the inconsistency."

Bravo-Fernandez v. United State, No. 15-537

Held: The Double Jeopardy Clause bars the governments of Puerto Rico and the United States from prosecuting the same person for the same crime.

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SUPREME COURT OF THE UNITED STATES
GAMBLE v. UNITED STATES
No. 17-646 - Argued December 6, 2018

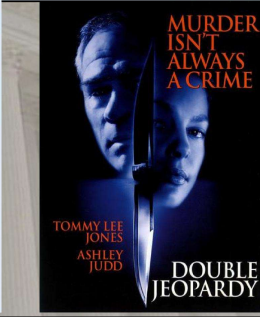
· Issue: Should the Supreme Court end the "separate sovereigns" exception to the double jeopardy clause?

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COMING ATTRACTIONS

GAMBLE v. UNITED STATES, No. 17-646 - Argued December 6, 2018

- Alabama police pulled over Terance Gamble for a faulty headlight.
- Two bags of marijuana, a digital scale, and a handgun.
- State Drug Charges + both state and federal felon in possession of a firearm charges.
- Gamble argued prosecuting him on the federal firearm charge violated the 5th Amendment's double jeopardy clause,
 - No one shall "be twice put in jeopardy" "for the same offence."



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COMING ATTRACTIONS

GAMBLE v. UNITED STATES, No. 17-646 - Argued December 6, 2018

- The lower courts rejected claim because of "separate sovereigns" doctrine –
- State and federal governments are different sovereigns and therefore can both prosecute someone for the same conduct.



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COMING ATTRACTIONS

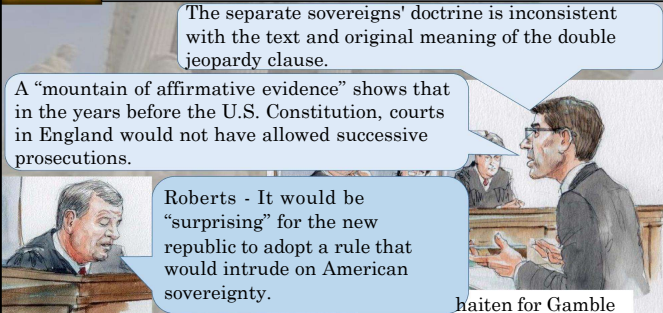
GAMBLE v. UNITED STATES, No. 17-646 - Argued December 6, 2018

The separate sovereigns' doctrine is inconsistent with the text and original meaning of the double jeopardy clause.

A "mountain of affirmative evidence" shows that in the years before the U.S. Constitution, courts in England would not have allowed successive prosecutions.

Roberts - It would be "surprising" for the new republic to adopt a rule that would intrude on American sovereignty.

Justice Kavanaugh for Gamble



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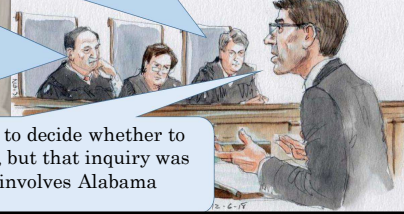
COMING ATTRACTIONS

GAMBLE v. UNITED STATES, No. 17-646 - Argued December 6, 2018

Alito – What about a hypothetical case where terrorists murdered American tourists and a foreign country acquits them. Does that mean the United States can't prosecute the terrorists?

Kavanaugh – But we need to consider the question because your position extends to foreign prosecutions and could hamper national security.

The U.S. court would have to decide whether to recognize the foreign court, but that inquiry was not necessary here, which involves Alabama courts.



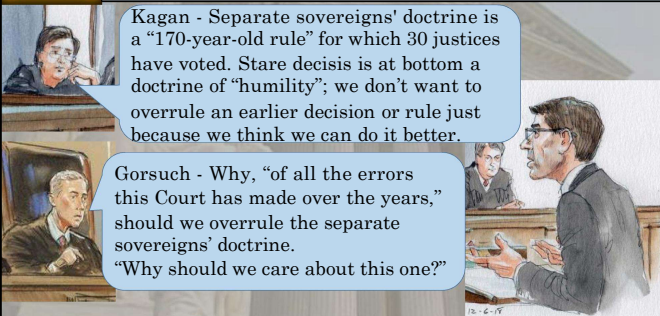
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COMING ATTRACTIONS

GAMBLE v. UNITED STATES, No. 17-646 - Argued December 6, 2018

Kagan - Separate sovereigns' doctrine is a "170-year-old rule" for which 30 justices have voted. Stare decisis is at bottom a doctrine of "humility"; we don't want to overrule an earlier decision or rule just because we think we can do it better.

Gorsuch - Why, "of all the errors this Court has made over the years," should we overrule the separate sovereigns' doctrine. "Why should we care about this one?"



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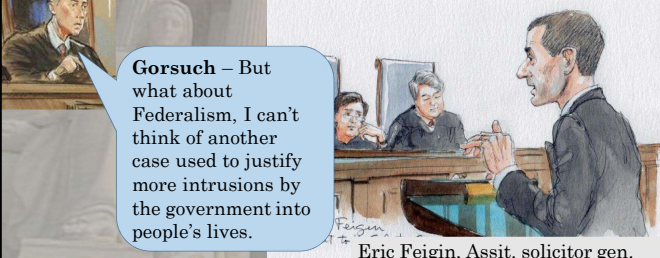
COMING ATTRACTIONS

GAMBLE v. UNITED STATES, No. 17-646 - Argued December 6, 2018

Gorsuch later seemed to side with Ginsburg and Thomas who had previously suggested the Court should reconsider the separate sovereigns doctrine.

Gorsuch – But what about Federalism, I can't think of another case used to justify more intrusions by the government into people's lives.

Eric Feigin, Assit. solicitor gen.



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COMING ATTRACTIONS

GAMBLE v. UNITED STATES, No. 17-646 - Argued December 6, 2018

Implications of a win for Gamble?
 State court prosecutions from Special Counsel Robert Mueller's investigation into possible Russian interference in the 2016 election.



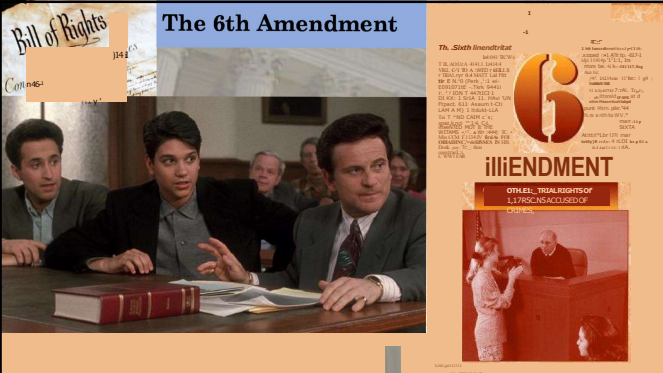
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COMING ATTRACTIONS

The 6th Amendment

Bill of Rights

6th Amendment



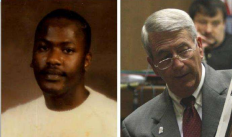
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COMING ATTRACTIONS

SUPREME COURT OF THE UNITED STATES
FLOWERS v. MISSISSIPPI
 No. 17-9572
 Argued March 20, 2019

COMING ATTRACTIONS

Black death-row inmate convicted by jury with just one Black person.
 Stated Issue: Did the Mississippi Supreme Court misapply *Batson v. Kentucky*?
 Unstated Issue: How does a prosecutor's history of *Batson* violations affect the *Batson* analysis in a current case?




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FLOWERS v. MISSISSIPPI, No. 17-9572
Argued March 20, 2019

COMING ATTRACTIONS

- **Evans prosecuted the next four trials.**
- **Trial 3** overturned because Evans violated *Batson* by using 15 peremptory strikes to remove African-Americans jurors.
- **Trials 4 and 5** = deadlocked.
- **Trial 6:** Evans allowed the first of six potential African-American jurors to be seated, but then struck five resulting in a jury with 11 white jurors and just one African-American juror.



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FLOWERS v. MISSISSIPPI, No. 17-9572
Argued March 20, 2019


COMING ATTRACTIONS

The “only plausible interpretation of all of the evidence viewed cumulatively is that Doug Evans began jury selection in” the sixth trial “with an unconstitutional end in mind - to seat as few African American jurors as he could.”

Auito - The “history of this case prior to this trial is very troubling.” But did the 6th trial standing violate *Batson*?

It did by “clear and convincing” evidence of discrimination.

What about Evan’s nondiscriminatory reasons for striking?



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FLOWERS v. MISSISSIPPI, No. 17-9572
Argued March 20, 2019

COMING ATTRACTIONS


Kavanaugh - “We can’t take the [*Batson*] history out of the case.”

Evans removed 41 of 42 potential African-American jurors during Flowers’ trials.

“how do you look at that and not come away thinking what was going on there was” exactly *Batson* prohibited?

The Mississippi attorney general should have prosecuted the sixth trial, “preferably in a different county.”

The AG “was not an option” because local prosecutor Evans had not asked for help.



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FLOWERS v. MISSISSIPPI, No. 17-9572
Argued March 20, 2019

COMING ATTRACTIONS

Roberts - This case "is unusual because you have [Evan's] extensive history" of misconduct and Batson.

But how far back should courts look to evaluate a prosecutor's past misconduct?

If the prosecutor violated Batson once 20 years ago is that something courts should consider now?

Courts should consider it to a point. Courts should also take into account how recently the misconduct happened, "whether it's on a relatively similar matter, whether the person has the same motive."

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FLOWERS v. MISSISSIPPI, No. 17-9572
Argued March 20, 2019

COMING ATTRACTIONS

Clarence Thomas for the first time since 2016 asked a question!

Thomas - Did Flowers' lawyer use peremptory strikes and, if so, what was the race of the jurors?

The trial lawyer only removed white jurors; "her motivation is not the question here. The question is the motivation of Doug Evans."

3-20-19

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SUPREME COURT OF THE UNITED STATES
GARZA v. IDAHO
No. 17-1026 - Decided February 27, 2019

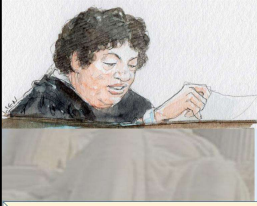
- Facts:** Garza entered into plea agreements for aggravated assault and possession with intent to deliver meth.
- His plea agreements waived right to appeal.
- Garza repeatedly asked his lawyer to file an appeal.
- Lawyer did not disclose file notice of appeal and did not tell Garza.

Issue: Was this ineffective assistance of counsel?

Graza

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GARZA v. IDAHO, No. 17-1026 – Decided February 27, 2019



Opinion: Sotomayor (6-3)

Flores-Ortega - whenever an attorney's deficient performance costs a defendant an appeal he otherwise had; prejudice is presumed for determining whether the defendant's counsel provided ineffective assistance.

Held: When a defense lawyer decides not to file an appeal despite his client's request, he renders ineffective assistance of counsel, even if the client waived his right to appeal.

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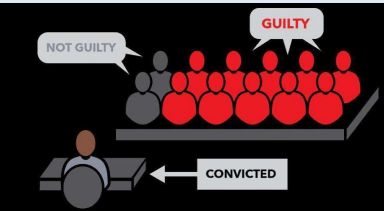
COMING ATTRACTIONS

SUPREME COURT OF THE UNITED STATES
RAMOS v. LOUISIANA
No. 18-5924

COMING ATTRACTIONS

Issue: Whether the 14th Amendment fully incorporates the 6th Amendment guarantee of a unanimous verdict.

· Court may fix *Apodaca v. Oregon*, 406 U.S. 404 (1972) holding state juries may convict of felony by a less-than-unanimous verdict.




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COMING **RAMOS v. LOUISIANA**, No. 18-5924

· *Apodaca* = plurality

- Four justices = 6th Amend didn't require unanimous juries in either state or federal trials;
- Four others = 6th Amend requires unanimous juries in *both* state and federal trials.
- Justice Lewis F. Powell Jr. = wrote 6th Amend required unanimous juries in federal trials but not in state cases even though the 14th Amend applied to the states.



· Louisiana's voters in November approved an unanimity requirement as of January 1, 2019.

· Louisiana argues this moots the case.

· But still have Louisiana prisoners convicted with non-unanimous juries.

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RAMOS v. LOUISIANA, No. 18-5924

- Ramos cites historical evidence the 1898 state constitutional conviction put in the non-unanimous-jury rule to "establish white supremacy in this state."
- The non-unanimous rule was to prevent minority black jurors from blocking a white majority's decision to punish black defendants.

CONSTITUTION

State Constitutional Convention

EXTRACT FROM THE CONSTITUTION

Purpose of 1898 convention was to eliminate the 1868 Constitution.

46

RAMOS v. LOUISIANA, No. 18-5924

- Underlying issue: Does the 14th Amendment "incorporate" all the Bill of Rights?
- In *McDonald v. City of Chicago* (2010) 2nd Amend "right to bear arms" applies to states.
- See next case, *Timbs v. Indiana* regarding the 8th Amend. "excessive fines" clause.

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The 8th Amendment

Bill of Rights

United States

CONGRESS

EIGHTH

AMENDMENT

NO CRUEL AND UNUSUAL PUNISHMENTS

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SUPREME COURT OF THE UNITED STATES
TIMBS v. INDIANA
 No. 17-1091
 Decided February 20, 2019
 ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
 INDIANA
 Opinion Author: Justice Ginsburg

· 8th Amendment Case = not Death Penalty

**EXCESSIVE BAIL SHALL
 NOT BE REQUIRED, NOR
 EXCESSIVE FINES IMPOSED,
 NOR CRUEL AND UNUSUAL
 PUNISHMENTS INFLICTED.**




EXCESSIVE FINES

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TIMBS v. INDIANA
 No. 17-1091 - Decided February
 20, 2019

- Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft.
- Police seized Timbs' Land Rover SUV purchased for \$42,000 with non-drug money
- The State sought civil forfeiture of Landrover - charging that the SUV had been used to transport heroin.



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Proceedings Below:

- Trial court denied State's request - Landrover purchase = 4x the maximum fine
- "Grossly disproportionate to the gravity of Timbs's offense"
- Unconstitutional under the Eighth Amendment's Excessive Fines Clause.
- Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrains only federal action.

TIMBS v. INDIANA
 No. 17-1091 - February 20,
 2019

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TIMBS v. INDIANA
No. 17-1091 - Decided February 20, 2019






- Institute for Justice took case
- Amicus briefs from diverse coalition
 - Cato Institute,
 - American Civil Liberties Union,
 - Southern Poverty Law Center,
 - NAACP,
 - Constitutional Accountability Center,
 - Pacific Legal Foundation
 - National Association of Criminal Defense Lawyers,
 - Judicial Watch,
 - The United States Chamber of Commerce

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TIMBS v. INDIANA
No. 17-1091 - Decided February 20, 2019




Not really about the \$\$\$\$

Underlying issue = extent of 14th Amendment to the states

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TIMBS v. INDIANA
No. 17-1091 - Decided February 20, 2019



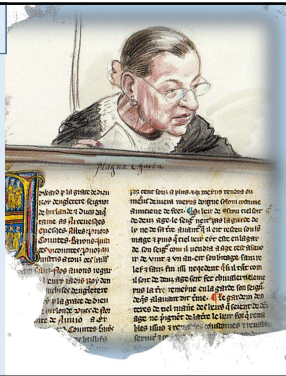
· **Held:** The Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause

- (a) The Fourteenth Amendment's Due Process Clause incorporates and renders applicable to the States Bill of Rights protections.
- "If a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."

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TIMBS v. INDIANA
No. 17–1091 - Decided February 20, 2019

- The Excessive Fines Clause carries forward protections from Magna Carta, to the English Bill of Rights to colonial state constitutions to today.
- Fines can undermine other liberties.
 - Fines used to retaliate against or chill the speech of political enemies.
- Employed, not in service of penal purposes, but as a source of revenue.



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TIMBS v. INDIANA
No. 17–1091 - Decided
February 20, 2019

Everybody =
Happy



Ginsburg + Roberts, Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh
Gorsuch and Thomas filed Separate concurring opinions (Privileges and Immunities clause rather than Due Process clause)

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The 14th Amendment

“... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”

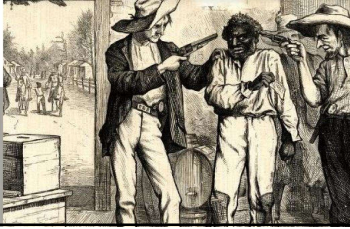
Why the need for the incorporation doctrine?

“nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person ... the equal protection of the laws.”

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

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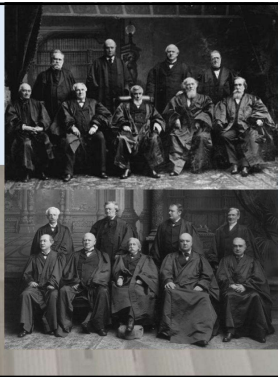
- While Congress was drafting the 14th Amendment former confederate states routinely imposed excessive fines on freedmen and pro-union whites for minor violations.
- Texas imposed fines for "leaving home without permission" and "impudence."



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The Waite and Fuller Courts

- The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) held that the "Privileges or Immunities" only protects the legal rights of federal citizenship, not state citizenship.



**Federal citizenship Rights in 1870's
= travel between states and use
navigable rivers**

59

In 1833 *Barron v. Baltimore* the Supreme Court held the Bill of Rights applied only to the federal, but not any state governments.

The *Slaughterhouse Cases* held the same.

What would have been the point of the 14th Amendment?!!

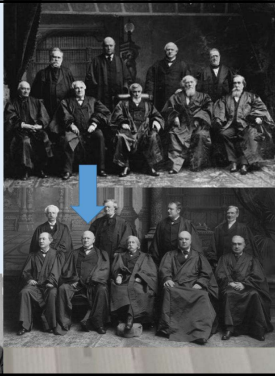


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The Waite and Fuller Courts

- The *Civil Rights Cases*, 109 U.S. 3 (1883) held the 1875 Civil Rights Act unconstitutional, because Congress lacked authority to regulate private affairs under the 14th Amendment and the 13th Amendment "merely abolishes slavery".
- The 1875 Civil Rights Act had banned race discrimination in access to public services.

Justice Harlan
famously dissented

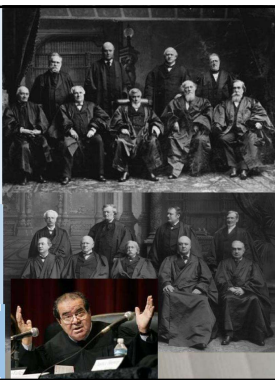


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The Waite and Fuller Courts

United States v. Cruikshank, 92 U.S. 542 (1875).
Held = The Bill of Rights essentially not application to the states after the 14th Amendment.

- 1st Amendment Right doesn't apply to the states
- 2nd Amendment Right doesn't apply to the states
- *DC v. Heller* (2008) and *McDonald v. Chicago* (2010) individual right to bear arms applies to states



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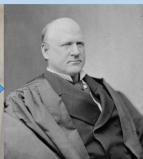
The Waite and Fuller Courts

- After gutting the Privileges and Immunities and Due Process Clauses what about using the Equal Protection Clause?


What is the easiest way to defeat the equal protection clause?

Plessy v. Ferguson, 163 U.S. 537 (1896) upheld the constitutionality of racial segregation laws for public facilities under the "separate but equal" fiction.

Justice Harlan
again famously dissented



63

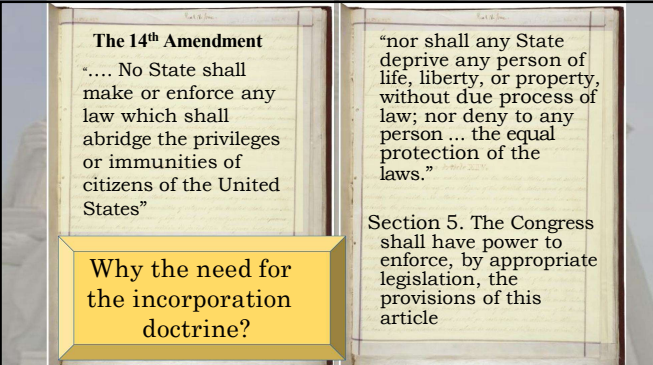


The Curious Case of Clarence Thomas

- Ardent foe of Affirmative Action's Constitutionality
- 14th Amendment, §5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article
- *McDonald v. Chicago* (2010) Second Amendment incorporated through the Due Process Clause to the states.
- Justice Thomas declared he would reach the same incorporation through the Privileges or Immunities Clause and reverse the *Slaughterhouse Cases*.

Thomas = remains the only Justice to call for reversing any Waite and Fuller Court cases.

64



The 14th Amendment

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"

Why the need for the incorporation doctrine?

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person ... the equal protection of the laws."

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

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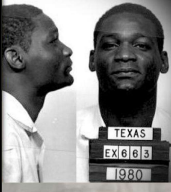

OCTOBER TERM, 2018
SUPREME COURT OF THE UNITED STATES
MOORE v. TEXAS
No. 18-443 - Decided February 19, 2019

OCTOBER TERM, 2016
SUPREME COURT OF THE UNITED STATES
MOORE v. TEXAS
No. 1 - Decided March 28, 2017

From two years ago –
October term 2016

Held in 2017 - A determination of intellectual disability must comport with current medical consensus.

Texas Court used unscientific factors for measuring intellectual disability from *Of Mice and Men*.

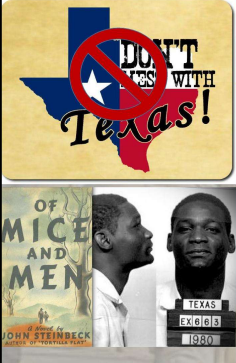



66

MOORE v. TEXAS
No. 18-443 - Decided February 19, 2019

Texas messes-up again!

Holding: Texas Court of Criminal Appeals' redetermination Bobby James Moore does not have an intellectual disability and is thus eligible for the death penalty is inconsistent with *Moore v. Texas* (2017).




67

SUPREME COURT OF THE UNITED STATES
MADISON v. ALABAMA
No. 17-7505 – Decided February 27, 2019

Issue: Do 8th Amendment evolving standards of decency bar executing an incompetent prisoner?

- vascular dementia and multiple strokes
- severe cognitive dysfunction and a degenerative medical condition
- prevents him from remembering his crime or understanding the circumstances of his scheduled execution.




68

No. 17-7505

- Madison strokes in 2015 and 2016, resulting in vascular dementia and inability to remember killing the police officer.
- He is blind
- Has significant mental decline
- Only remembers the alphabet to the letter G
- Has slurred speech.

· However, according to the court-appointed psychologist Madison understands he will be executed and the reason.



69

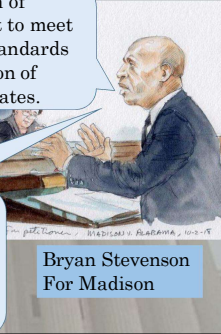
MADISON v. ALABAMA, No. 17-7505

- *Ford v. Wainwright* – 8th Amendment does not allow executing the insane.
- *Panetti v. Quarterman* – an inmate must understand "the meaning and purpose of" his death sentence.

Dementia can be a form of incapacitation sufficient to meet the *Ford* and *Panetti* standards prohibiting the execution of some incapacitated inmates.

Madison is disabled beyond just memory loss and thus his execution would violate the Eighth Amendment's prohibition of cruel and unusual punishment.

Bryan Stevenson
For Madison



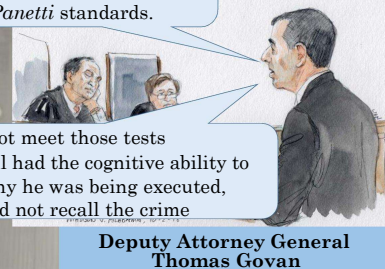
70

MADISON v. ALABAMA, No. 17-7505

- *Ford v. Wainwright* – 8th Amendment does not allow executing the insane.
- *Panetti v. Quarterman* – an inmate must understand "the meaning and purpose of" his death sentence. But Madison did not meet those tests because he still had the cognitive ability to understand why he was being executed, even if he could not recall the crime

I agree dementia could be a form of incapacitation sufficient to meet the *Ford* and *Panetti* standards.

Deputy Attorney General
Thomas Govan




71

MADISON v. ALABAMA, No. 17-7505

Judgment: Vacated and remanded (This case is remanded for renewed consideration of Madison's competency).
Opinion: Kagan
Dissent: Alito, Thomas, Gorsuch (Kavanaugh took no part in the case).

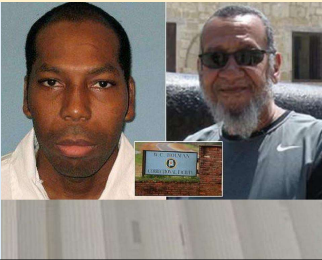
Held: The Eighth Amendment may permit executing a prisoner even if he cannot remember committing his crime, but it may prohibit executing a prisoner who suffers from dementia or another disorder rather than psychotic delusions.



72

SUPREME COURT OF THE UNITED STATES
DUNN v. RAY
 586 U.S. (2019),
 ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

- **Back to the Death Penalty - Death and religious freedom.**
- Defendant **Domineque Hakim Marcelle Ray** wanted his imam, Yusef Maisonet, in the death chamber.
- Alabama only allowed a Christian chaplain.
- Maisonet watched the execution from an adjoining witness room.




73

DUNN v. RAY
 586 U.S. ____ (2019).

- 11th Circuit stayed the execution.
- Supreme Court vacated the stay holding only Ray had waited too long to object.
- Ray was executed.


5-4 Vote

- Gorsuch Opinion with Roberts, Thomas, Alito, Kavanaugh
- Dissent = Breyer, Ginsburg, Kagan, Sotomayor




74

DUNN v. RAY
 586 U.S. (2019).



The majority was “profoundly wrong.”


- Under Alabama’s policy, “a Christian prisoner may have a minister of his own faith accompany him into the execution chamber to say his last rites.”
- “But if an inmate practices a different religion — whether Islam, Judaism or any other — he may not die with a minister of his own faith by his side.”
- “That treatment goes against the Establishment Clause’s core principle of denominational neutrality.”



75

MURPHY *v.* COLLIER
587 U.S. (2019),
No. 18A985. Decided March 28, 2018
ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
TEXAS


- The Death Penalty - Death and religious freedom.
- 2 Months later and criticism from conservative Christian groups and the National Review.
- Supreme Court stayed the execution of Patrick Murphy in Texas.
- Murphy wanted a Buddhist spiritual advisor instead of the mandated Christian chaplain.



76

SUPREME COURT OF THE UNITED STATES
MURPHY *v.* COLLIER
587 U.S. (2019).

"The State may not carry out Murphy's execution unless the State permits Murphy's Buddhist spiritual adviser or another Buddhist reverend of the State's choosing to accompany Murphy in the execution chamber during the execution."



77

SUPREME COURT OF THE UNITED STATES
MURPHY *v.* COLLIER
587 U.S. (2019).

Thomas and Gorsuch would have denied the stay.

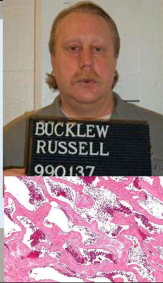
Kavanaugh - "The government may not discriminate against religion generally or against particular religious denominations."



78

SUPREME COURT OF THE UNITED STATES
BUCKLEW V. PRECYTHE,
 587 U.S. (2019),
 ON WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF
 APPEALS


- Russell Bucklew suffers from cavernous hemangioma
- A progressive disease causing an "unstable blood-filled tumor to grow in his head, neck and throat"
- Lethal injection could cause death by prolonged suffocation causing "severe harm and suffering."
- Bucklew asks for death by lethal gas.



79

BUCKLEW V. PRECYTHE,
 587 U.S. ____ (2019).


- Bucklew asks for death by lethal gas



80


BUCKLEW V. PRECYTHE,
 587 U.S. ____ (2019)

- *Bucklew* = first major death case since Justice Brett Kavanaugh replaced Justice Anthony Kennedy.
- Kennedy voted to put the execution on hold.

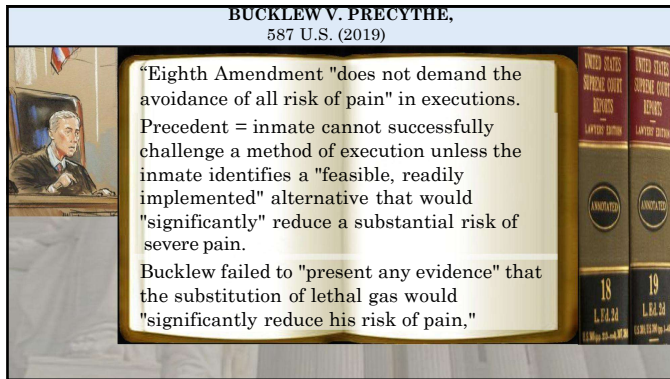


5-4 Vote

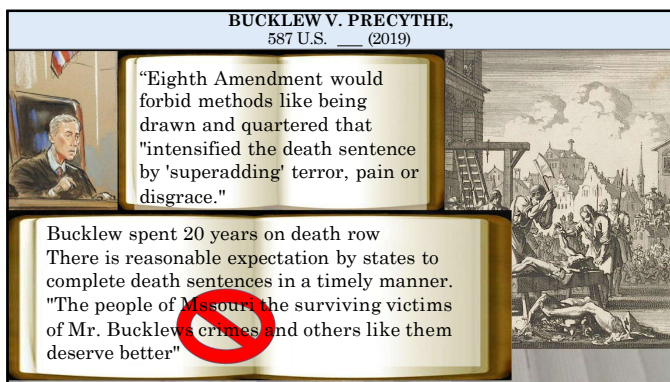
- Gorsuch Opinion with Roberts, Thomas, Alito, Kavanaugh
- Dissent = Breyer, Ginsburg, Kagan, Sotomayor



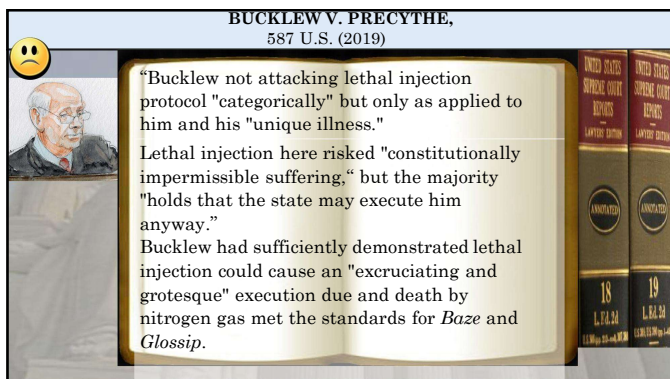
81




82





83






84

	The Breyer Dissent	Past case – 2015 GLOSSIP v. GROSS
JUSTICE BREYER, with GINSBURG dissent	<p>+ “Rather than try to patch up the death penalty’s legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.”</p> <p>+ <i>Gregg v. Georgia</i>, 428 U. S. 153, 187 (1976) - “In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems.”</p> <p>+ “I believe that it is now time to reopen the question.”</p>	

85

	SUPREME COURT OF THE UNITED STATES KAHLER v. KANSAS 18-6135 ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS	
<ul style="list-style-type: none"> · Issue: Whether the 8th and 14th Amendments permit a state to abolish the insanity defense. · In 1996 Kansas eliminated the insanity defense—unless the defendant shows he was unable to form the “mental state” necessary to violate the law. 		

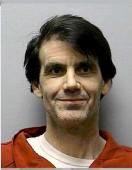
86

	KAHLER v. KANSAS, 18-6135	
<ul style="list-style-type: none"> · A defendant unable to form the “intention” to kill could not be convicted, but one who could “intend” to shoot or kill could be, regardless of how distorted the subjective reasons for doing so.  <ul style="list-style-type: none"> · 3 other states—Idaho, Montana, and Utah—abolished the insanity defense, · Alaska truncated the defense allowing conviction even if a defendant didn’t understand right from wrong at the time of the crime. · 7 others—California, Colorado, Louisiana, Minnesota, Mississippi, Nevada, Washington—courts suggest the Constitution requires the insanity defense 		

87

COMING
ATTRactions

KAHLER v. KANSAS, 18-6135




- James K. Kahler in 2009 went to his ex-wife's grandmother's house on Thanksgiving 2009 and killed the grandmother, his ex-wife, and the couple's two daughters.
- Lawyers offered evidence he was suffering from major depressive and obsessive-compulsive disorders.
- A defense expert testified that Kahler "felt compelled" to kill and was, for that period, "completely out of control."

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COMING
ATTRactions

KAHLER v. KANSAS, 18-6135




- Jury could decide only whether Kahler had the intent to kill;
- Jury concluded he did and sentenced him to death.
- Kansas supreme court rejected his constitutional challenge to the insanity law.
- Argument before Supreme Court:
- Does blocking the traditional insanity defense violate the 8th Amendment's ban on "cruel and unusual" punishment?

89



· 1843 - The M'Naghten Rules – a panel of judges answered Parliament's hypothetical questions defining the rules.

· Daniel M'Naghten had been acquitted for killing Edward Drummond, whom he mistook for British Prime Minister Robert Peel.



"at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong."

Sir Robert Peel
First police - 1860s
"Bobbies" or "Peelers."

90

Supreme Court

- *Ford v. Wainwright* 477 U.S. 399 (1986) - upheld the common law rule that the insane cannot be executed.
- Also, a person under the death penalty is entitled to a competency evaluation and to an evidentiary hearing in court regarding his competency to be executed.
- *Wainwright v. Greenfield*, held it is fundamentally unfair for the prosecutor to argue the respondent's silence after receiving Miranda warnings was evidence of sanity.

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Summery of the 2018 Term

92

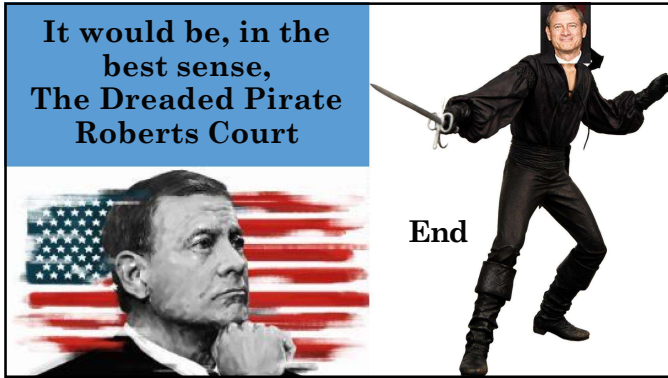


- **Underlying emerging issue:**
 - Does the 14th Amendment “incorporate” all the Bill of Rights?
- If the Robert’s Court overturned the legacy of the Waite and Fuller Courts and gave the 13th and 14th Amendments their full intended scope, this would be a foundational change.

Regarding the expansion of liberty and procedural rights, the Roberts’ Court could be greater than even the Warren Court.



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